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No. 92-1587

In the Supreme Court of the United States

October Term, 1992

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

HARRIET DAVIS,

Respondent,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Harriet Davis, asks leave to file her Brief in Opposition and to proceed in forma pauperis pursuant to Supreme Court Rule 39.1. The respondent's affidavit is filed with this Court.

The respondent had court-appointed counsel in both the Michigan Court of Appeals and the Michigan Supreme Court.

April 28, 1993

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THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

HARRIET DAVIS,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER POLICE OFFICERS WITH UNCORROBORATED INFORMATION CONTAINED IN A RADIO BULLETIN CAN DEMAND AT GUNPOINT THAT AN OCCUPANT OF A MOTEL ROOM OPEN HER DOOR TO PERMIT THEM TO CONDUCT A WARRANTLESS SEARCH.

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STATEMENT OF THE CASE

Detroit police officers Hill and Brown responded to a radio run "[Car] 7-7, 3250 East Jefferson, Belmar Motel, room 33 or 34, ah, desk clerk says shots fired," and drove to the Belmar Motel. (77A)[1] The tape of the call into Detroit emergency number 911 reveals that a woman called and identified herself as the manager of the "Belmont Hotel." (76A) She was unable to give the operator an address or location of the motel and sounded like she was calling from a pay phone. Id. She did not furnish the description of any suspects but merely reported that shots were fired "out of" room 33 or 34. Id.

Officers Hill and Brown were not in Car 7-7, but responded to the run anyway. (11A, 32A, 77A) They parked their car in the driveway entrance of the motel near the manager's office, but did not discuss anything with the desk clerk before investigating the motel. (15A) First, they went into the parking area of the motel. (16A) They saw no persons with weapons, no persons at all, no criminal activity, and nothing which aroused their suspicion. (15A, 32A) Armed with a shotgun and with a service revolver, and in full uniform, they went to room 33 and banged on the door, stating "Police, open up." (17A) They observed a woman (the respondent) look out the window of the room, but she did not open the door. (17-18A) Brown continued to bang his fist on the motel room door. The manager was then contacted and asked to supply a key to open room 33, but before he could open the room with a key, the woman in room 33 finally acceded to police requests and opened the door to the room. (23A) The Michigan Court of Appeals affirmed the trial court's finding that the entry of the officers, in full uniform, at gunpoint, and after demanding entry at gunpoint, was not consented to by the respondent.

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1 References to the appendices in the Michigan Supreme Court are made by a capital "A" following the page of that appendix; references to the Petitioner's appendix in this Court are made by a lower case "a" following the page number.

The Court of Appeals stated:

> Clearly, where an occupant opens a door in compliance with a police demand there can be no consent as a matter of law. (11a)

The Michigan Supreme Court found that the prosecutor conceded that the respondent did not consent to the entry of the officers. (35a)

At the time the door was opened, Hill testified that the woman was not free to leave, but was detained. (45A) Without any conversation, the officers, with their guns still out, then stepped across the threshold and entered room 33. (19-20A) The Michigan Supreme Court found that the prosecution conceded that the police officers entered the room. (11a) Hill and Brown explained the radio run they received and the purpose of their visit. (19A, 36A) Brown claims he then observed what appeared to be the butt of a gun sticking out from underneath the mattress[2] and some paraphernalia on a dresser which he believed to be narcotic paraphernalia. (20A) Hill did not make either observation, but when his partner announced he saw a gun, Hill proceeded further into the room and into the bathroom. (37A) In the bathroom he observed a bag of white powdery substance which he believed to be drugs. (39A)

The officers secured the room and requested the radio dispatch to notify a narcotics car of the Detroit Police that they needed assistance at the "Belmont Hotel." (77A) Substances from the dresser, from the closet, and from the bathroom were seized and placed into evidence and the respondent was arrested and charged with several drug offenses and a weapons charge. (19a)

In the trial court, the respondent filed a motion to suppress evidence, contesting the warrantless entry into the room and the subsequent search of the room. On November 2, 1989, the trial court held an evidentiary hearing

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2 In Michigan, concealing a firearm at a person's "dwelling" is not unlawful. MCL 750.227; MSA 28.424.

and, on December 12, 1989, suppressed the evidence seized, ruling the search and seizure unlawful because of non-consensual entry without a warrant and without exigent circumstances. See trial judge's opinion, pp. 8-9 of Petition for Certiorari. All charges against the respondent were then dismissed.

On May 21, 1991, the Michigan Court of Appeals held in a per curiam opinion that the police officers in this case could enter the motel room at gunpoint without a warrant based on "exigent circumstances." (1a-19a)

On May 20, 1992, the Michigan Supreme Court granted the respondent's application for leave to appeal, and on March 2, 1993, in a lengthy and unanimous opinion, reversed the Michigan Court of Appeals, and affirmed the trial court's suppression of evidence seized by the officer. (20a-75a)

SUMMARY OF ARGUMENT

The decision of the Michigan Supreme Court in this case was based on the facts of the case, which revealed that police officers had merely received an uncorroborated radio run that shots may have been fired out of one of two possible motel rooms. When the police officers arrived at the scene they were unable to confirm that anything had happened, nonetheless, they demanded entry at gunpoint to one of the rooms. The respondent relunctanctly admitted the police officers for a nonconsensual entry and search. The police officers possessed no warrant, nor any specific information that any crime had been committed, nor any description of any suspect of a crime. No injured person was ever found, nor did the police ever check the second motel room to see if any injured person lay therein.

The Michigan Supreme Court's findings and factual analysis are consistent with United States Supreme Court precedent, with the decisions of other federal and state courts, and with a previous Michigan Supreme Court decision. The test articulated by the Michigan Supreme Court to determine the reasonableness of police officers' emergency entry is consistent with the test developed by other state and federal courts.

The petition filed in this case violates United States Supreme Court Rule 21.1(h) because it does not disclose the stage of proceedings at which the particular federal question raised by petitioner was brought. The particular federal question brought in this case - that the Michigan Supreme Court erred in finding that an entry is not reasonable because some of the circumstances were susceptible of innocent explanations - was never raised in the Court below by any of the parties in any of the briefs filed. The petitioner has fastened on part of the factual analysis by the Michigan Supreme Court to suggest that their factual analysis raises a federal constitutional question, a question which was not presented to the Michigan Supreme Court nor any of the Courts below.

REASONS WHY THE PETITION SHOULD BE DENIED

I. POLICE CANNOT DEMAND ENTRY TO A MOTEL ROOM AT GUNPOINT, WITHOUT A SEARCH WARRANT, WHERE THEY HAVE RECEIVED AN UNCORROBORATED RADIO RUN THAT SHOTS MAY HAVE BEEN FIRED AT THE MOTEL

Justice Brickley, writing for a unanimous Michigan Supreme Court, held that police officers in the instant case could not demand entry of a motel room at gunpoint without a search warrant where they only had received a radio run that shots may have been fired but had observed nothing themselves. Justice Brickley summarized the court's factual conclusions and analysis:

> The police had received a radio dispatch informing them that the manager at the motel had reported hearing shots fired in or out of one of two motel rooms. We note again the words of the dipatch: "Belmar motel, Room 33 or 34, desk clerk says shots fired." The dispatch identified two possible rooms. It also directed them to a possible witness. It does not suggest that any person was injured, other than by implication because of the inherently dangerous nature of gunshots. With this dispatch as their only source of information, upon arriving at the motel, the police proceeded to one of the two rooms, where they encountered an occupant who was unwilling to open the door. This is the totality of information that the police had before them.

It is important to note that unlike Barone, supra, [United States v. Barone, 330 F.2d 543 (2nd Cir., 1964)] where the police themselves heard screams, the police in this case had not heard shots fired. Nor did they interview any witnesses who heard them, not even the desk clerk, whom the dispatch identified as the source of the information. Further, as we noted above, unlike Boggess, supra, [State v. Boggess, 115 Wis. 2d 443, 340 N.W. 2d 516 (1983)] where the anonymous caller gave considerable detail about alleged child abuse, the initial source of information here gave very little detail about the situation. In this case, the caller claimed to be the manager of the motel, and was unable to provide its address or cross street, purportedly because of having just started the job. In addition, the record does not indicate that the police made inquiries of the manager who approached them, or that they knocked on other doors. They encountered no circumstances that suggested that shots had in fact been fired. We recognize that the defendant took several minutes to open the door and that the police became suspicious that she was hiding something. Indeed, they could well have considered the possibility that she was concealing a person in need of aid. However, there are other possible explanations for her behavior. She could have been dressing, concealing contraband, or simply been unwilling to open the door. The mere fact that she delayed in opening the door does not, in our judgment, support a reasonable belief that a person within the room was in need of immediate aid.

The issue in this case is not whether the sound of gunfire could justify entry to a motel room under the emergency aid doctrine. We surmise that in most cases it would. The issue, rather, is whether information reporting such sounds coming from a somewhat questionable source who possesses limited knowledge of the location of the motel was, without further corroboration, sufficient to provide a reasonable basis on which to expect that a person or persons were in need of emergency aid. Under the circumstances of this case, we answer that question in the negative.

As the trial judge stated, we do not question that the police may investigate when they receive a dispatch like this one, but rather in what manner they may do so. Our decision requires that the police have reasonable belief, based on specific and articulable facts, that a person within is in need of immediate aid before they force entry into a dwelling. The police were unquestionably justified in investigating the radio dispatch. They were justified in going to the door of room 33 and attempting to ascertain if shots had indeed been fired. They were free to interview a manager or desk clerk, or the occupants of adjoining

> rooms. However, the constitution prohibits them from forcing entry into a dwelling on the basis of a speculation that someone inside may have been injured.
>
> Accordingly, we find that the people have not shown that the police reasonably could have believed, on the basis of specific and articulable facts, that a person within room 33 was in need of immediate aid. The police were thus not authorized to force entry into the room. Therefore, we hold that the entry into defendant's room violated the Fourth Amendment, and the evidence obtained pursuant to that entry must be suppressed. (66a-71a) (emphasis in original)

In reaching this conclusion, the Michigan Supreme Court applied the standard for reasonableness as follows:

> [W]e hold that police may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance. [footnotes ommitted] (65a-66a)

The Michigan Supreme Court distinguished the instant case from a prior decision, where the court had permitted police to effectuate an entry to render emergency aid. In City of Troy v. Ohlinger, 438 Mich. 477, 475 N.W. 2d 54 (1991), the court had held that it was permissible for an officer to enter a home to render aid or assistance. Justice Levin, writing for a unanimous court, had stated a test which needed to be met in order to justify warrantless entry of a home to render immediate assistance to a person who is in serious need of medical aid. Justice Levin stated:

> Where the police have probable cause, based on specific, articulable facts, to believe that immediate entry is necessary to assist a person who may be in serious need of medical aid, they may enter without a warrant. The entry must be limited to the justification therefor, and the officer must be motivated primarily by the "perceived need to render aid or assistance." The officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance. [footnotes omitted] 438 Mich. at 83-84.

The decision in the instant case which the Petitioner seeks to review at once extended Ohlinger and also limited it. The requirement in Ohlinger that police "have probable cause" was reduced to a standard that the police must "reasonably believe" that a person within is in need of immediate aid. (66a) While the actions of the police were approved in Ohlinger, the actions of the police in the instant case were not approved by the Michigan Supreme Court because the facts known to the officers did not "provide a reasonable basis on which to expect that a person or persons were in need of emergency aid." (70a)

The articulation of the police powers to render emergency assistance and the limits to those powers, as established by the Michigan Supreme Court in the instant case and in Ohlinger, are no different than those established by other state courts throughout the country. See, e.g.; State v. Prober, 98 Wis. 2d 345, 297 N.W. 2d 1 (1980); Zinn v. State, 656 P. 2d 1206 (Ala. App. 1982); People v. Mitchell, 39 N.Y. 2d 173, 383 N.Y.S. 2d 246, 347 N.E. 2d 607 (1976).

The decision of the Michigan Supreme Court and its analysis is consistent with federal cases that have interpreted the "emergency aid" doctrine and with the rule of law that a police officer cannot demand entry to a person's room to investigate unknown circumstances in the absence of a search warrant. See Johnson v. United States, 333 U.S. 10 (1948) (a police officer who smelled the smell of opium burning could not knock on the door and demand entrance to investigate in the absence of a search warrant). Police officers, absent exigent circumstances, need an arrest warrant before entering a home or a motel room occupied by a suspect. See, Payton v. New York, 445 U.S. 573 (1980)

The "community caretaking" function, as enunciated by the United States Supreme Court in Cady v. Dombrowski, 413 U.S. 433 (1973), does not permit a warrantless entry at gunpoint based on uncorroborated information. In that case, this Court held that where a vehicle had been involved in a motor vehicle accident and the occupant injured, and where the police knew the

occupant was an off-duty police officer, after towing the disabled vehicle from the accident scene, the police could search the vehicle for the off-duty officer's firearm, since it was known that he carried one, since one had not been found on his person, and since the presence of a firearm in a vehicle presented a danger. The community caretaking function suggested by Cady v. Dombrowski is a function of the police that is "totally divorced from the detection, investigation or acquisition of evidence" relating to a crime. 443 U.S. at 441.

The "emergency aid" doctrine may allow police officers to enter a residence to offer emergency aid or assistance without a search warrant, but it does not permit entry at gunpoint based on uncorroborated information. The doctrine developed from Mincey v. Arizona, 437 U.S. 393 (1978) where the court stated in dicta that police officers could enter premises under some circumstances to provide emergency assistance to individuals without a search or arrest warrant. The Court stated:

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. [footnotes omitted] 437 U.S. at 392.

In Mincey, the Supreme Court made it clear that the only time a police officer has legal authority to search premises without a warrant to protect life or property is when it is clear there is a "need to protect or preserve life or avoid serious injury * * *." Id, quoting Wayne v. United States, 318 F. 2d 205, 212 (C.A. D.C., 1963) (opinion of J. Burger.) As with the commmunity caretaker function, the emergency aid doctrine authorizes the actions of police officers which are not actions to search for evidence or arrest for crime. The actions of the police officer are actions not based on probable cause to arrest or search, but actions that are clearly meant to

provide aid or assistance to an injured person.

The facts of the instant case are not similar to the facts of Mincey. In Mincey, a police officer accompanied by nine other plain clothes policeman and a deputy county attorney returned to an apartment where a heroin deal had been arranged. The door was opened for the undercover policeman who was admitted to the apartment. The person who admitted the undercover officer attempted to slam the door to keep the other officers from entering, but the police rushed into the apartment. As they entered the apartment, a rapid volley of shots was heard from the bedroom. The undercover officer emerged and collapsed on the floor. The other officers then entered the bedroom and found Mincey lying on the floor wounded and semi-conscious.

The Court implied that the immediate search of the apartment at the time of the shooting, for injured persons or persons who are armed, might have been reasonable. However, the warrantless search of the apartment by homicide officers who arrived 10 minutes later after they heard a radio report of the shooting was not reasonable. The Court noted that:

> * * *[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment * * * . The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. 437 U.S. at 393.

The dicta in Mincey about a police officer's ability to make warrantless entries to assist someone in need of immediate aid, or to search for homicide victims or the killer, was therefore never relied on by the Court in Mincey, where the search of the homicide officers was based on their response to a radio report and was not action to provide emergency aid. Therefore, the search in Mincey was held to be impermissible.

In the instant case a radio run suggesting there are shots fired does not rise to any higher level than the radio run to homicide officers in Mincey. The police officers in the instant case possessed less information than the homicide officers in Mincey, since the homicide officers in Mincey arrived at the scene of a crime, were voluntarily admitted to the apartment by other officers, and were faced with a dead body, a wounded man, and a crime scene to investigate. Compare that to the officers in the instant case who, before they demanded entry at gunpoint into the motel room where they found the respondent, had observed nothing unusual or suspicious on the scene. If the officers in Mincey who responded to the radio run could not conduct a warrantless search at the apartment based on an "emergency aid" exception, the officers in the instant case could not demand entry at gunpoint without a warrant.

In Whitely v. Warden, 401 U.S. 560 (1971), this Court held that a police radio broadcast cannot provide probable cause to arrest. In that case, an invalid arrest warrant[3] had been issued for two defendants and a bulletin was disseminated to police agencies across the state describing the defendants and their vehicle. In reliance on the radio bulletin, a policeman arrested the two described men when he saw them in the described vehicle and after a search of the vehicle found the fruits of a crime therein. The Court held that while the officer could make an arrest in reliance upon the radio bulletin, ultimately it would have to be shown that the police, collectively, had probable cause, or the fruits of the arrest could not be utilized against the defendant.

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3 The affidavit in support of the arrest warrant was legally insufficient.

Other courts have also failed to approve of the actions of police officers who acted on uncorroborated information contained in a radio bulletin. See, United States v. Timberlake, 896 F.2d 592 (C.A.D.C. 1990) and State v. Benson, 198 Neb. 14; 251 N.W. 2d 659, 661, cert. den. 434 U.S. 833 (1977)

II. THE FEDERAL CONSTITUTIONAL QUESTION PRESENTED BY THE PETITION FOR CERTIORARI WAS NOT PRESENTED TO THE STATE COURTS BELOW

The petition filed in this case does not meet the requirements of Supreme Court Rule 21.1(h), in that the statement of the case fails to state the stage in the proceedings at which the federal question presented by the petition was raised by the parties below. Perhaps the reason that the petition does not comply with that requirement is that the federal question raised by the petition was never raised in the court below.

The petitioner suggests that the Michigan Supreme Court erred in finding that an entry by police officers to render emergency aid or assistance is not reasonable if the circumstances on which it is based are susceptible of innocent explanations. First of all, this was not the holding of the Michigan Supreme Court. As discussed above, the holding was simply that the prosecution did not show "that the police reasonably could have believed, on the basis of specific and articulable facts, that a person within room 33 was in need of immediate aid." (71a) Thus, the Michigan Supreme Court held, the police were not authorized to force entry into the motel room. The Court's holding was preceded by a long factual analysis, and the petitioner attempts to abstract from that analysis one factual observation that the Court made in order to bootstrap a federal constitutional issue. However, the Michigan Supreme Court's ruling was based on all of the circumstances, its complete factual analysis, and not on the fact that the circumstances were susceptible of innocent explanations.

Moreover, the legal question which the Petitioner brings to this Court is based on one United States Supreme Court case (United States v. Cortez) and three Federal District Court cases (United States v. Holland, United States v. Sokolow, and United States v. Sutton), all of which are cited in the Petitioner's index of authorities. The Petitioner never presented this argument or this authority to the Michigan Supreme Court, to the Michigan Court of Appeals, or in any way presented this federal authority to the lower courts.

Pursuant to Rule 21.1(h), the Petitioner has not shown to this Court that the federal question he seeks this Court to review was ever presented to the lower courts, a requirement for this Court to exercise jurisdiction.

CONCLUSION

The decision of the Michigan Supreme Court was correctly decided based on existing precedent and did not articulate a new rule of federal constitutional law. The federal question now presented by the petition was not raised in the Courts below. For these reasons the petition for certiorari should be denied.

April 28, 1993

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